PP

v.

NURUL SYUHADA SHAMSUDIN

COURT OF APPEAL, PUTRAJAYA
ABDUL MALIK ISHAK JCA
LINTON ALBERT JCA
MOHD ZAWAWI SALLEH JCA
[CRIMINAL APPEAL NO: P-05-46-2011]
28 APRIL 2014

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Mother giving birth to baby and flushing baby into toilet bowl - Whether birth a live birth - Cause of death could not be ascertained by forensic pathologist - Whether could not be guilty of murder - Whether only guilty of lesser offence - Penal Code, ss. 300, 302, 318*

CRIMINAL PROCEDURE: *Sentencing - Fair and appropriate sentence - Mother giving birth to baby and flushing baby into toilet bowl - Whether guilty of concealment of birth by secret disposal of dead body - Adequate sentence - Penal Code, s. 318*

This was an appeal against the decision of the learned High Court Judge in acquitting and discharging the respondent of a charge of murder under s. 302 Penal Code on the ground that no *prima facie* case had been made out against the respondent. The facts showed that the respondent, having given birth to a child in a toilet, had flushed the child into the toilet bowl. It was however, the testimony of the consultant forensic pathologist ('SP9') upon examining the body of the child, which was subsequently recovered from the septic pipe, that, although the baby could have been breathing upon delivery, the baby could have died before a full expulsion, thereby making the birth not a life birth. It was SP9's further opinion that the cause of death, on the facts and circumstances of the case, could not be ascertained and that the baby could also have died from natural causes, such as lack of oxygen, etc. The prosecution argued nonetheless that the learned judge had erred in not calling for the respondent's defence, and in any case, that sufficient evidence had been adduced to establish an offence under s. 318 of the Penal Code (concealment of birth by secret disposal of dead body).

Held (dismissing appeal; substituting order of acquittal with a conviction under s. 318 Penal Code)
Per Linton Albert JCA delivering the judgment of the court:

(1) The evidence of SP9 that the cause of death could not be ascertained invariably meant that it was inconceivable that any of the requirements of s. 300 of the Penal Code could be established. It stood to reason, therefore, that the prosecution had failed to establish a *prima facie* case and the respondent had rightly been acquitted and discharged for the offence of murder. (para 8)

(2) On the evidence adduced, there was overwhelming evidence in respect of an offence under s. 318 of the Penal Code. Consequently, upon her guilty plea hereof, and considering the fact that she had been in remand for the past 13 months, the respondent was sentenced to a fine of RM3,000, in default three months' imprisonment. (paras 9 & 10)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan terhadap keputusan yang arif Hakim Mahkamah Tinggi kerana melepaskan dan membebaskan responden atas pertuduhan bunuh di bawah s. 302 Kanun Keseksaan atas alasan bahawa tiada kes *prima facie* telah dibuktikan terhadap responden. Fakta menunjukkan bahawa responden, setelah melahirkan anak di dalam sebuah tandas, telah mengepam bayi tersebut ke dalam mangkuk tandas. Apapun, pakar bedah konsultan forensik ('SP9'), setelah memeriksa mayat bayi setelah ianya dikeluarkan dari paip tandas, menerangkan bahawa, walaupun bayi mungkin bernafas sewaktu dilahirkan, ia mungkin sudah mati sebelum sempat keluar sepenuhnya, sekaligus menjadikan kelahiran tersebut bukan satu kelahiran hidup. SP9 seterusnya berpandangan bahawa, berdasarkan fakta dan hal keadaan kes, punca kematian tidak dapat dipastikan dan bahawa kematian bayi juga mungkin diakibatkan oleh sebab-sebab semulajadi, seperti kekurangan oksigen dan sebagainya. Pendakwaan menghujahkan bahawa yang arif hakim khilaf apabila tidak memanggil responden untuk membela diri, dan walau apapun, bahawa keterangan yang mencukupi telah dikemukakan bagi mensabitkan responden atas kesalahan di bawah s. 318 Kanun Keseksaan (menyembunyi kelahiran melalui pembuangan mayat secara sulit).

Diputuskan (menolak rayuan; menggantikan perintah pembebasan dengan sabitan di bawah s. 318 Kanun Keseksaan)
Oleh Linton Albert HMR menyampaikan penghakiman mahkamah:

(1) Keterangan SP9 bahawa sebab kematian tidak dapat dipastikan secara berkesannya bermakna bahawa tiada satu pun dari kehendak-kehendak s. 300 Kanun Keseksaan dapat dibuktikan. Justeru, pendakwaan gagal membuktikan suatu kes *prima facie* dan responden telah dengan betulnya dilepaskan dan dibebaskan daripada pertuduhan bunuh.

(2) Berdasarkan keterangan, terdapat limpahan keterangan yang menunjukkan kesalahan di bawah s. 318 Kanun Keseksaan. Oleh itu, mengambilkira pengakuan bersalah responden terhadap kesalahan tersebut, dan fakta bahawa responden telah berada dalam tahanan selama 13 bulan, responden dijatuhkan hukuman denda RM3,000 jika tidak bayar tiga bulan penjara.

Legislation referred to:
Courts of Judicature Act 1964, s. 60(1)
Penal Code, ss. 300, 318

For the prosecution - Aslinda Ahad; DPP
For the respondent - E Gunasegaran; M/s E Gunasegaran & Co

[Editor's note: For the High Court judgment, please see PP v. Nurul Syuhada Shamsudin [2011] 1 LNS 1803.]

Reported by Wan Sharif Ahmad

JUDGMENT

Linton Albert JCA:

[1] The respondent was charged with the murder of a female infant (the baby) at about 12.30am on 30 December 2009 inside a female toilet at the production section of a factory at Bayan Lepas, Penang.

[2] The facts established by the prosecution were these. The baby was retrieved by Shabri bin Jatin (SP6) a member of the fire brigade based in Bayan Baru in the evening of 30 December 2009

A from the septic pipe of the number 3 female toilet after breaking the toilet bowl. The baby was already dead then. The alarm was raised by Mahaletchumi a/p Letchumanan the factory cleaner who complained that the number 3 toilet was blocked which finally led to the fire brigade being called to assist. Hence SP6's involvement
B in retrieving the baby who was stuck in the septic pipe. Hasmah bt Ibrahim (SP7) was a worker at the factory. She testified that she was working on shift starting from 7pm on 29 December 2009 to 7am on 30 December 2009. At around 4am she went to urinate at toilet number 4 which was next to toilet number 3
C which was closed when she went into toilet number 4 and while she was inside she heard the flushing sound of the toilet in toilet number 3 and also heard the cries of a baby. When she came out of toilet number 4, toilet number 3 was still closed. She was scared that what she heard was a ghost and did not inquire
D further about what she heard.

[3] The post mortem was carried out by Dr Bhupinder Singh (SP9) the consultant forensic pathologist of Penang Hospital. SP9 testified that his examination of the body of the baby did not
E disclose any external injury nor was there any injury to its internal organs. He conducted the relevant tests and concluded that the baby was born alive. He ruled out drowning and suffocation as the cause of death even though for a new born delivered and forced into a toilet bowl, the chances of survival could be minimal
F because of the possibility of drowning or suffocation. SP9 ruled out death due to drowning or suffocation, having conducted the relevant examination before coming to that conclusion. He concluded that the time of death was undetermined and that the cause of death was unascertained. SP9 also explained that it was
G possible that the baby breathed when it came out of the mother's vagina but could have died before full expulsion from it and in his opinion even though the baby could have breathed it was not life birth because life birth meant full separation of the baby from the mother and had an independent existence. It was significant that
H SP9 also agreed that the baby could have died of natural causes due, for example, to lack of oxygen before total separation from the mother's vagina.

[4] Noraini binti Mohd Tajudin (SP7) testified that she was in
I the same shift as the respondent who told SP7 that she was not well. At 10.30pm during their break SP7 went together with the

respondent to the canteen and noticed that the respondent was not well and all along she was holding her stomach. She said the respondent asked to go back before 7am because she was not well.

[5] Norazida binti Daud (SP10) the government chemist who carried out the DNA profiling concluded that the respondent was 99.9% likely to be the mother of the baby. So much for the evidence established by the prosecution.

[6] The learned trial judge acquitted and discharged the respondent without calling for her defence. Hence this appeal. Learned DPP submitted that on the evidence adduced the prosecution had established a *prima facie* case and even if the learned trial judge had been correct in concluding otherwise, there was sufficient evidence to establish an offence under s. 318 of the Penal Code.

[7] We do not think it is necessary to embark on an exhaustive judicial scrutiny of the evidence adduced to determine whether the learned trial judge was correct. Suffice to state that the learned trial judge was correct because the prosecution case itself borne out by the evidence of SP9 created a reasonable doubt on an essential element of the offence of murder which was one of the four aspects of murder under s. 300 of the Penal Code which states:

> Except in the cases hereinafter excepted, culpable homicide is murder:
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> (a) if the act by which the death is caused is done with the intention of causing death;
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> (b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
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> (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
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> (d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid (See *Woolmington v. DPP* [1935] AC 462).

[8] The evidence of SP9 that the cause of death could not be ascertained invariably meant that it was inconceivable that any of the requirements of s. 300 of the Penal Code could be established. It stood to reason, therefore, that the prosecution had failed to establish a *prime facie* case and the respondent had rightly been acquitted and discharged for the offence of murder. An offence under s. 318 of the Penal Code would be another matter. It is perhaps useful to set out the provision of s. 318 of the Penal Code which is this:

> Whoever by secretly burying or otherwise disposing of the dead body of a child, whether such child dies before or after or during its birth, intentionally conceals or endeavours to conceal the birth of such child shall be punished with imprisonment for a term which may extend to two years or with fine or with both.

[9] On the evidence adduced there was overwhelming evidence in respect of an offence under s. 318 of the Penal Code and we so found. Authority for this can be found under s. 60(1) of the Courts of Judicature Act 1964:

> At the hearing of an appeal the Court of Appeal shall hear the appellant or his advocate, if he appears, and, if it thinks fit, the respondent or his advocate, if he appears, and may hear the appellant or his advocate in reply, and the Court of Appeal may thereupon confirm, reverse or vary the decision of the High Court, or may order a retrial or may remit the matter with the opinion of the Court of Appeal thereon to the trial court, or may make such other order in the matter as to it may seem just, and may by that order exercise any power which the trial court might have exercised:
>
> > Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

[10] The respondent pleaded guilty to a charge for an offence under s. 318 of the Penal Code and was accordingly convicted. Having heard the respondent's plea in mitigation to the effect that she was a first offender, that she pleaded guilty and the fact that she was remanded for 13 months and released only after the trial and having also heard the learned DPP's plea for a maximum sentence consonant with the requirements of public interest, the respondent was sentenced to a fine of RM3,000 in default three months' imprisonment.

[11] In the upshot the appeal against acquittal and discharge for murder was dismissed and the decision of the High Court affirmed and substituted with a conviction under s. 318 of the Penal Code and sentenced to a fine of RM3,000 in default three months' imprisonment.